File date
8/16/06

No. 05-1505

In the Supreme Court of the United States

GLORIA ALLRED AND ALLRED, MAROKO & GOLDBERG,
PETITIONERS,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA,
RESPONDENT,

THE PEOPLE OF THE STATE OF CALIFORNIA, AND SCOTT EDGAR DYLESKI,
REAL PARTIES IN INTEREST

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID C. COLEMAN
Public Defender

ELLEN LEONIDA
Deputy Public Defender
Counsel of Record

RONALD R. BOYER
Deputy Public Defender

800 Ferry Street
Martinez, CA 94553
(925) 335-8000

Counsel for Real Party in Interest
SCOTT EDGAR DYLESKI

Question Presented

In a criminal case that is receiving intensive media coverage prior to trial, by what standard may a court protect the defendant's Sixth Amendment right to a fair trial with a protective order that bars a witness's attorney from public comment upon the guilt or innocence of the defendant or upon evidence in the public record that is not the result of a court proceeding?

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Robert S. Weider, *How to Manipulate the Media: Twenty Timeless Tips for When the Press Comes Calling*, in Fifth Annual Litigation Management Supercourse (PLI Litig. & Admin. Practice Course Handbook Series, No. 497, 1994) ---- 12

Constitutional Provisions Involved

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . .

U.S. Const, art. III, § 2.

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const, amend. I.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

U.S. Const., amend. VI.

> No state shall . . . deprive any person of life, liberty, or property without due process of law . . . .

U.S. Const., amend. XIV.

Statement of the Case

On October 19, 2005, Scott Dyleski (then sixteen years old) was arrested and charged with murdering the wife of Daniel Horowitz, a nationally-renowned attorney and television legal commentator. Mr. Horowitz was at the time involved in a high-profile, criminal trial. Mr. Dyleski's case immediately received intense media attention. Local, national, and international press reports contained information ostensibly leaked by law enforcement officers and witnesses. All of the reports presumed Mr. Dyleski to be guilty and many were quite inflammatory. Mr. Dyleski's court appearances were packed with spectators; people lined up outside the courtroom before it was open; many were turned away.

On October 26, 2005, prior to trial, the defendant brought a motion for a protective order, seeking to prohibit the prosecution and law enforcement from discussing the case with the news media. The district attorney joined that motion and asked that the protective order extend to the district attorney's office, the sheriff's office, the public defender's office, the law offices of a private attorney who initially represented Mr. Dyleski, and the offices of Petitioner Allred.

The *San Francisco Chronicle*, as well as Petitioner Allred, opposed the motion. Ms. Allred represented a witness who at the time had not been identified publicly. In her opposition to the motion, Ms. Allred represented that she had no intention of publicly commenting upon her client's potential testimony in this matter or "any matters that are not part of the public record." Opposition to Proposed Imposition of a Gag Order Upon Gloria Allred, 9:19-20, Oct. 27, 2005. Nonetheless, Ms. Allred sought to simultaneously

represent the witness in these proceedings and to provide public commentary on these same proceedings.

On October 27, 2005, the trial court made the following factual findings:

1. There has been an extra-ordinarily high amount of pretrial publicity in this matter prior to this date, when arraignment on the charges is just occurring.

2. There is a reasonable likelihood that continued dissemination of information about the case, by the parties or their attorneys or material witnesses, would make it difficult to impanel an impartial jury in the matter.

3. The request for a "gag" order justifies the court hearing the matter upon an emergency basis, provided that all those affected are given the right, upon reasonable notice, to be heard before the order involves more than a temporary period of time.

Protective Order, 1:17-2:1, Oct. 27, 2005. Based on these findings, the trial court issued the following preliminary order:

> [U]ntil further order of this Court, the Office of the District Attorney, those investigating the case on behalf of the People, the Defendant, counsel for the Defendant, Court staff, those who might be material witnesses in the matter, or attorney [sic] or other representatives of such material witnesses, shall refrain from discussing this case, the evidence expected to be used in the case, or the issues in the case, the merits of the case, or trial tactics or strategy, with the media or in an otherwise public fashion.

Id., 2:2-9. The trial court also invited briefing and set a further hearing on the motion for a protective order.

Ms. Allred was personally served with a copy of that protective order immediately after the hearing. Declaration of Harold W. Jewett, 2:9-11, Oct. 28, 2005. Immediately after receiving a copy of the court's order, Ms. Allred made comments to the press in front of the courthouse, including the statement that "I represent a young client who is a potential witness." *Id.* at 2:14-16. That evening, Ms. Allred appeared on

a Fox News program and was interviewed regarding the case. *Id.* at 2:18-3:5. Based on these actions, the next day the district attorney moved the court to modify the protective order to include Ms. Allred by name. Ex Parte Application for Modification of Protective Order, Oct. 28, 2005. In response, the trial court issued an amended protective order, which added a clause to make it applicable to "attorneys of persons that might be potential witnesses" (Amended Protective Order, Oct. 28, 2005) and faxed it to Ms. Allred together with a letter stating the court's intention that the order apply to Ms. Allred (Ltr. from Hon. David B. Flinn to Gloria Allred, Oct. 28, 2005).

Prior to the hearing on the motion for a protective order, Mr. Dyleski's case was the subject of coverage that included CNN, MSNBC, Fox News, ABC News, CBS News, NBC News, Court TV, *USA Today*, *People* Magazine, *The New York Times*, the AP wire, *The Los Angeles Times*, *The Atlanta Journal-Constitution*, Reuters, *The Dallas Morning News*, *The Austin American-Statesman*, the New Orleans *Times-Picayune*, and New York *Newsday*. Fox News covered the case in depth on at least five different shows, including *The Lineup*, *Day Side*, and *Big Story Weekend*. The Fox News program *The O'Reilly Factor* covered the case at least five times prior to the hearing on the protective order, and *On the Record with Greta Van Susteren* covered the story almost daily. The coverage by local newspapers and television was more extensive, each outlet often including several stories per day.

At the hearing on the motion, Ms. Allred's counsel opposed a broad order, but represented that she did not seek to reveal evidence in advance of trial.

> [MR. GOLDBERG:] There's no reason to believe that Ms. Allred doesn't understand that the People and the defendant are entitled to a fair trial. There's no reason to believe that she doesn't understand that she can't and won't, and has indicated in her declaration has not and will not, preview

> the testimony or comment about what the witness is going to say about a specific piece of evidence. She wouldn't do that. She understands that that would not be something that would be – that would be reasonable to do in a case of this nature, and she wouldn't do that.
>
> But to say a blanket restriction, say, "You can't talk about anything to do with the case," that's just way too far. It's a prior restraining of speech, and it's political speech, your Honor, and it prevents her not only from talking about the case, it prevents her from talking about if there's police abuse concerning her client, prevents her from doing that. It prevents her from talking about whatever happens, doesn't happen, or how the grand jury process might have been misused in this case. Prevents her from talking about anything to do with the case. Prevents her from defending in any manner --

R.T., 29:24-30:16, Nov. 16, 2005.

After the hearing, the trial judge did not issue a "blanket restriction." The order at issue here is limited to talking about the evidence. And it is limited to out-of-court statements.

> [Specified persons] shall refrain from making any out-of-court statement as to any of the following:
>
> 1. The nature, source, substance or effect of any purported evidence alleged to have been accumulated or to exist in regard to this matter.
>
> 2. The existence, or possible existence, of any document, exhibit or other physical evidence, the admissibility of which may have to be ruled upon by the court.
>
> 3. Any opinion or public comment as to the weight, value or effect of any evidence as tending to establish either guilt or innocence.
>
> 4. The identification or possible existence of any other person that might be alleged to have committed or participated in the commission of the subject crime.
>
> 5. The identification of any potential witness to the crime, or his or her probable testimony.

Protective Order, 2:1-13, Nov. 21, 2005; Petition for Writ of Certiorari, App. 3-4.

Moreover, specifically excluded from the coverage of the order are six classes of statements. The protective order provides:

> Nothing herein shall prohibit any of the following:
>
> 1. The defendant, or those acting upon his behalf, from unequivocally asserting his innocence of the crime of which he is accused.
>
> 2. Factual statements of an accused person's name, age, residence, occupation, educational status or family identification.
>
> 3. The date, time and place of the arrest of an accused.
>
> 4. The nature, substance and text of the charge and a description of its parameters.
>
> 5. The scheduling and result of any stage of the judicial proceeding held in open court.
>
> 6. Any witness discussing any matter in connection with the case with any attorney representing either the People or the Defendant, or investigators on their behalf, or an attorney from whom they might seek legal advice.

Protective Order, 2:15-3:3, Nov. 21, 2005; Petition for Writ of Certiorari, App. 4. Only the fifth and sixth categories would be applicable to Ms. Allred, but the fifth category permits her to comment publicly about any aspect of a proceeding in open court that may be fairly characterized as the "result."

Furthermore, the order places no limits on what Ms. Allred or anyone else may say in court. And the order places no limits on media coverage of the court proceedings.

Ms. Allred sought a writ of mandate in the California Court of Appeal. Her petition was summarily denied. She petitioned for review in the California Supreme Court. That petition, too, was denied. Ms. Allred then petitioned for certiorari in this Court.

Accompanying her petition for certiorari was a request for a stay of the trial court's order. Mr. Dyleski filed an opposition to the request for stay. That request for stay was denied.

Mr. Dyleski filed in this Court a waiver of the right to file a response to the petition for writ of certiorari. On July 20, 2006, however, this Court asked Mr. Dyleski to file opposition to the petition for writ of certiorari. The instant opposition is filed in compliance with that request.

On July 17, 2006, immediately prior to this Court's request for briefing, the jury trial commenced.

Reasons for Denying the Petition

1. The instant case is a poor vehicle for resolving the split among the lower courts.

Ms. Allred urges this Court to grant certiorari because there is a three-way split among state and federal courts regarding the standard applicable in a case such as this.. Petition for Writ of Certiorari, 10. "[S]ome courts have held that gag orders on lawyers' speech about pending cases are allowed only if there is a clear and present danger of harm." *Id.* "[O]ther circuits and states have taken a second approach, allowing gag orders on lawyers and trial participants so long as there is a 'reasonable likelihood of harm,' . . . ." *Id.* at 12. "Yet a third approach . . . allows gag orders on lawyers and trial participants if a court finds a 'substantial likelihood' that speech could pose a threat to fair adjudicatory proceedings." *Id.* at 14. Given that the trial judge in the instant case applied the highest standard, the standard that Ms. Allred urges upon this Court, it does

not appear that the instant case would be the most appropriate vehicle for reviewing this split of authority.

On page 2 of her Petition, Ms. Allred states: "The trial court imposed this order without any findings that the speech posed a clear and present danger, or a substantial likelihood, or even a reasonable likelihood, or materially prejudicing the adjudicatory proceedings." On page 16 of her Petition, she reverses field and asserts: "In issuing the protective Order in this case, the Superior Court used the "reasonable likelihood test." Neither of these is a fair reading of the trial judge's ruling. *Cf.* Rules of the Supreme Court of the United States, Rule 15.2.

In his order, Judge Flinn cites *Gentile v. State Bar of Nevada* and *Younger v. Smith* as providing the applicable standards.

> It is often the case, as it is in the instant proceedings, that there exists a dispute as to just what burden must be met before a "gag order" of any sort is placed by the court. Some urge that a "clear and present danger" must be established while others urge that a lesser standard can be imposed. In *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, a 5 to 4 majority of the United States Supreme Court upheld the test of "a substantial likelihood of material prejudice" to be adequate, at least as to orders relating to attorneys.
>
> In *Younger v. Smith* (1973) 30 Cal.App.3d 138, 162, the court appears to put this alleged 'difference' in standards of proof aside, commenting that "a reasonable likelihood of an unfair trial is, in itself, a clear and present danger to the administration of justice."

Decision Granting in Part and Denying in Part Motions for Protective Order, 2:23-3:7, Nov. 21, 2005; Petition for Writ of Certiorari, App. 6-7. Judge Flinn's order then makes findings of fact regarding what had unfolded with respect to media coverage so far. *Id.* at 3:9-5:4; Petition for Writ of Certiorari, App. 7-8. Then the trial judge makes a statement

that can only reasonably be interpreted as meaning that, regardless of the standard, a protective order is justified in the instant case.

> That such findings justify the issuance of *some* form of protective order or "gag order" cannot be seriously questioned.

Id. at 5:6-7. Petition for Writ of Certiorari, App. 9.

It is disingenuous of the Petitioner to claim that Judge Flinn made no finding that the speech posed a clear and present danger. Rather, the trial judge applied the law to his findings of fact to hold, in effect, that under either the standard of "a substantial likelihood of material prejudice" or the standard of "a clear and present danger," a protective order of some kind was justified. Applying the law to the facts is a question of law and doesn't call for a finding, per se. The judge was not required to resolve the question of the applicable standard because the judge ruled that under either standard a protective order was justified.

Because the trial judge effectively applied the standard that Petitioner Allred seeks in this Court, this is not an appropriate case in which to resolve the question of whether a lower standard would have been sufficient.

2. Because the trial court applied the standard sought by Petitioner, Petitioner lacks standing to seek resolution of the question presented.

Article III of the United States Constitution limits the jurisdiction of this Court to "cases" and "controversies." U.S. Const, art. III, § 2. Among the doctrines delineating that limitation is the doctrine of "standing."

> Art III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . , and that the injury

> "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," . . . .

Valley Forge College v. Americans United, 454 U.S. 464, 472 (1982) (citations omitted). It is the last of these three requirements that is not met in the instant case.

Because the trial court applied the standard sought by Ms. Allred—holding that under any of the proposed standards the facts justified a protective order—a decision favorable to Ms. Allred in this Court would not bring a different result in the court below. Accordingly, under Article III, this Court is without jurisdiction.

3. The issue in the instant case is narrow.

Although the protective order at issue in the instant case has five numbered paragraphs specifying topics that may not be the subject of out-of-court statements, they are all fairly subsumed within the first sentence. The order prohibits the specified persons from discussing, outside of court, the "nature, source, substance or effect of any purported evidence."

In every courthouse in America, on every day that court has been in session since the founding of the Republic, attorneys, witnesses, and other citizens have been subjected to prior restraint of their speech regarding the evidence in criminal cases. These restraints are embodied in the rules of evidence and procedure that govern those proceedings. These rules severely restrict what may be said regarding the evidence in the presence of jurors or potential jurors.

Similarly, if an attorney, a witness, or another citizen were to walk out of the courtroom and into a hallway crowded with potential jurors and make statements

regarding the evidence, admissible or inadmissible, that would be regarded as misconduct of the highest order, perhaps prosecutable as embracery. (*E.g.*, Cal. Pen. Code § 95.)

> To what extent may a prosecutor, a defense attorney, or an attorney in a civil case be prohibited from arguing outside the courtroom to an actual juror or potential juror, . . . ? In considering the question, suppose that a defense attorney, in court and prior to empaneling the jury, moves to have a certain piece of evidence suppressed, . . . and the motion is granted. And now suppose that, in opening argument, the prosecuting attorney informs the jury that nine kilograms of crack cocaine were found in the defendant's bedroom. The prosecutor further informs the jury that a motion to suppress this evidence had been granted so that, unfortunately, the jury would be hearing nothing more about this evidence.
>
> Now we all know what would happen to the trial and the prosecutor at this point were this to happen. And we know as well what would happen if the prosecuting attorney were to claim a denial of his or her First Amendment right to speak to the jury—unmitigated laughter. And if this is so, then there is once again a serious question about why the issue is so different—why an argument that would be thought frivolous quickly becomes a serious First Amendment claim just because the physical locus of the speech is outside the courthouse walls, given that the substance of the restriction and the motivations behind it are virtually identical.

Fredrick Schauer, *The Speech of Law and the Law of Speech*, 49 Ark. L. Rev. 687, 693-94 (1977). *See also*, Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. Rev. 705 (2004).

There are times when the level of media attention on a case reaches a level of saturation such that statements made to the press are tantamount to statements made in that hallway crowded with potential jurors. It is understood among commentators that words said to the media can influence the course of trial.

> A commentator's words may also matter to the participants in a case. . . . Trial participants sometimes use commentary to guide what arguments or strategies they will present in court. While heard outside the courtroom, a commentator's voice can nonetheless have an impact inside the trial.

Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator II*, 37 Santa Clara L. Rev. 913, 917 (1997). And it is also understood among commentators that statements to the media can influence the course of a case prior to trial.

> Prominent civil rights attorney Gloria Allred has suggested that "[t]he press . . . provides leverage in cases that are publicly embarrassing to the opposition." Allred remarked: "'By convincing the defense that the matter will be on the front page many more times, a plaintiff's lawyer can raise a case's settlement value' and hasten its conclusion."

Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 Emory L.J. 859, 870 (1998), *quoting* Robert S. Weider, *How to Manipulate the Media: Twenty Timeless Tips for When the Press Comes Calling*, in Fifth Annual Litigation Management Supercourse, at 541, 545 (PLI Litig. & Admin. Practice Course Handbook Series, No. 497, 1994).

Once a jury has been selected, sequestration orders or prophylactic orders to the jury to avoid news regarding the case may serve to insulate the jury from such prejudicial statements. Prior to the selection of the jury—which was the posture of the case at the time that the trial court considered the motion for a protective order at issue in the instant case—no such remedies are available.

In the instant case, Ms. Allred seeks to perform the dual role of, in court, an attorney representing a witness and, on television, a commentator regarding the proceeding. Such a dual role involves a conflict of interest that should result in per se disqualification from one role or the other.

> Many conflicts will not require the complete disqualification of a legal commentator from covering a case. Some will only require the commentator to refrain from commenting on certain issues. However, there are some types of conflicts that could lead to complete disqualification. For example, per se disqualification should be imposed

> when the lawyer has been counsel on the case or is currently serving as counsel for any party or witness related to the case.

Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. Cal. L. Rev. 1303, 1333-34 (1996).

Ms. Allred argued that the district attorney was seeking her disqualification in the instant case. Opposition to Proposed Imposition of a Gag Order, 5:20-24, Oct. 27, 2005. And the trial judge expressed concern about Ms. Allred wearing these "two hats." R.T., 29:1-9, Nov. 16, 2005. But Judge Flinn did not impose disqualification. Nor did the trial court bar Ms. Allred from commenting about the case at all. Rather, the order is narrowly tailored to reach statements regarding evidence that has not been presented in open court. The protective order permits Ms. Allred to comment upon what actually happened in court. She may not comment on the inferences to be drawn regarding guilt or innocence. But it does not preclude comment upon any other inferences that might be drawn regarding evidence presented in court. And the order does not preclude commenting on the litigation strategies or effectiveness of either counsel so long as Ms. Allred's comments do not go to drawing inferences of guilt or innocence.

To the trial court, Ms. Allred represented that she does not seek to "preview the testimony or comment about what the witness is going to say about a specific piece of evidence." R.T., 29:26-30:2, Nov. 16, 2005. And she does not seek to comment upon any matters that are not part of the public record. Opposition to Proposed Imposition of a Gag Order Upon Gloria Allred, 9:19-20, Oct. 27, 2005. Accordingly, those aspects of the trial court's order are not in issue. Furthermore, the protective order does not prohibit Ms. Allred from discussing the results of any proceeding so long as she does not draw inferences regarding guilt or innocence.

Thus, at issue, is whether in advance of the selection of a jury Ms. Allred has a First Amendment right to comment on the guilt or innocence of Mr. Dyleski, and to discuss evidence in the public record that is not fairly characterized as the result of a proceeding. Or, to be more precise, the issue presented is whether in advance of the selection of a jury the First Amendment protects such public statements by an attorney in the proceeding, notwithstanding the intensity of the news coverage in the instant case and notwithstanding the defendant's Sixth Amendment right to a fair trial.

Conclusion

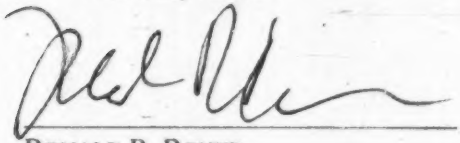
For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 16th day of August, 2006.

Respectfully submitted,

DAVID C. COLEMAN
Public Defender
Contra Costa County

ELLEN LEONIDA
Deputy Public Defender
Counsel of Record



RONALD R. BOYER
Deputy Public Defender

Counsel for Real Party in Interest
SCOTT EDGAR DYLESKI

No. 05-1505

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PROOF OF SERVICE

DAVID C. COLEMAN
Public Defender

ELLEN LEONIDA
Deputy Public Defender
Counsel of Record

RONALD R. BOYER
Deputy Public Defender

800 Ferry Street
Martinez, CA 94553
(925) 335-8000

Counsel for Real Party in Interest
SCOTT EDGAR DYLESKI

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

PROOF OF SERVICE

I, Ronald R. Boyer, do swear or declare that on this date, August 16, 2006, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

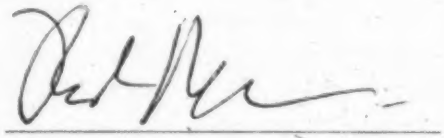
The names and addresses of those served are as follows:

Mr. Erwin Chemerinsky
Duke University School of Law
Science Drive & Towerview Rd.
Durham, NC 27708

Mr. Stanley M. Helfman
Office of the Attorney General
State of California
455 Golden Gate Ave., #11000
San Francisco, CA 94102-3664

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 2006.



Public Defender

800 Ferry Street
Martinez, California 94553
(925) 335-8000

David C. Coleman
Public Defender

Contra Costa County

Supervising Attorneys

Suzanne Chapot
Martinez

Michael J. Kotin
Richmond

Jack Funk
Richmond

Patrick Cannon
Martinez

Robin Lipetzky
Martinez

August 16, 2006

Clerk
Supreme Court of the United States
Washington, DC 20543

Re: *Allred v. Superior Court*
No. 05-1505

Dear Sir or Madam:

Enclosed please find an original and twelve copies of a Motion for Leave to Proceed *In Forma Pauperis* and an attached Opposition to Petition for a Writ of Certiorari in the above-entitled case. Please file the original and ten copies. Also enclosed is an original and one copy of a Proof of Service. Please file the original. Please conform and return the remaining copies of the motion and opposition and the remaing copy of the Proof of Service in the enclosed self-addressed, stamped envelope.

If there is any question or difficulty, do not hesitate to contact me at 925-335-8088. After August 31, 2006, any communication regarding this case should be directed in the first instance to Ellen Leonida at 925-335-8036.

Very truly yours,

Ron Boyer
Deputy Public Defender

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OFFICE OF THE CLERK
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